IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 27

NORTHERN CALIFORNIA PHARMACEUTICAL ASSOCIATION AND DONALD K. HEDGPETH, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Honorable The Chief Justice and the Associate Justices of The Supreme Court of the United States:

The Northern California Pharmaceutical Association, a California corporation, and Donald K. Hedgpeth respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of

Appeals for the Ninth Circuit, entered on June 27, 1962, affirming the final judgments entered on a jury verdict June 23, 1961, by the United States District Court for the Northern District of California, Southern Division, in a prosecution brought under Section 1 of the Sherman Act, 15 U.S.C. Section 1, in which it was adjudged that the corporate Petitioner pay a fine of $40,000.00 and that the individual Petitioner pay a fine of $1,000.00.[1]

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit dated June 27, 1962, is unreported but is reprinted in the Appendix to this Petition.[2]

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Were the activities of the Petitioners, complained of in the Indictment as consisting of participation in a conspiracy to establish and maintain uniform pricing for prescription drugs dispensed to patients in northern California through the use of a particular prescription pricing schedule, in restraint of interstate commerce within the jurisdiction of Section 1 of the Sherman Act, 15 U.S.C. Section 1?

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[1] Unless otherwise indicated, citations to the record refer to the printed Transcript of Record filed in the United States Court of Appeals for the Ninth Circuit and will appear as follows: "R., Vol. ——".

[2] App., *infra*, pp. 1a-23a.

2. Was the restraint alleged in this case, which was stated to consist of a conspiracy to establish and maintain uniform pricing for prescription drugs dispensed to patients in northern California through the use of a particular prescription pricing schedule, a restraint solely upon the calculating of charges for and upon the dispensing of prescriptions to patients by registered pharmacists in northern California, and consequently a restraint on the practice of a learned profession wholly local in character and therefore not within the purview of Section 1 of the Sherman Act?

3. Did the Petitioners engage in a conspiracy to establish and maintain uniform pricing for prescriptions dispensed to patients by registered pharmacists in northern California?

4. Were the activities of the Petitioners, drawn in question in the case as consisting of the publication and distribution of a particular prescription pricing schedule, directed to the reasonable regulation of the compensation of registered pharmacists in northern California through the regulation of prescription pricing within pharmacy in northern California and not directed to the fixing of the price of a commodity, and therefore, under the "Rule of Reason", not directed to an unlawful conspiracy to restrain interstate commerce in northern California?

5. Did the trial court, when it charged the jury on the alleged conspiracy and made no mention at that time of the prerequisite that the jury also find interstate commerce was present, commit prejudicial error which it failed to cure when it recalled and instructed the jury further on the issue of interstate commerce

alone without having first withdrawn its original instruction on the alleged conspiracy?

STATUTE INVOLVED

The statute involved is Section 1 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, 15 U.S.C. Section 1, being "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, which Section is set forth in pertinent part in the Appendix to this Petition.[3]

STATEMENT OF THE CASE

The prosecution in this case is based on an Indictment filed December 14, 1960, in the United States District Court for the Northern District of California, Southern Division, in which the Grand Jury charged that the Northern California Pharmaceutical Association, Donald K. Hedgpeth, the Petitioners herein, and other persons unknown, had conspired continuously from about the fall of 1956 through the date of the return of the Indictment to restrain unreasonably interstate commerce in prescription drugs in Northern California in violation of Section 1 of the Sherman Act.[4] The Indictment charged that the Petitioners entered into an agreement to establish and maintain uniform prices for prescription drugs sold to consumers in northern California, one of the means being the adoption, publication, and distribution of a particular prescription pricing schedule formulated by the Petitioner Donald K. Hedgpeth. The Petitioners also were charged with having agreed to urge and induce mem-

[3] App., *infra*, p. 23a.

[4] R., Vol. I, 7-9.

bers of the Petitioner Pharmaceutical Association and co-conspirator county pharmaceutical associations to fix uniform retail prices for prescription drugs by adopting the mentioned pricing schedule and revisions thereof.

A trial by jury in this case began on May 31, 1961 before the late Judge Louis E. Goodman of the United States District Court for the Northern District of California, Southern Division, the basis for federal jurisdiction being that the case arose under Section 1 of the Sherman Act. On June 16, 1961 the jury returned the verdict of guilty against both Petitioners and on June 23, 1961, final judgments were entered thereon.

Thereafter, Petitioners timely perfected an appeal to the United States Court of Appeals for the Ninth Circuit which, on June 27, 1962 entered its opinion and final judgment affirming the judgments of the trial court. Five basic issues were presented in this case, namely: Whether interstate commerce was present so as to satisfy jurisdictional requirements; whether the acts complained of constituted a restraint on the practice of the learned profession of pharmacy wholly local in character and therefore not within the purview of Section 1 of the Sherman Act; whether as a matter of law the existence of the conspiracy charged was proved; whether or not the challenged activities of the Petitioners were justifiable under proper application of the so-called "Rule of Reason" and therefore not violative of Section 1 of the Sherman Act; and, whether the trial court committed prejudicial error in its instructions to the jury on the alleged conspiracy which it failed to cure in its supplemental charge on the question as to whether interstate commerce was present.

Interstate Commerce

The jurisdictional question concerning the presence or absence of interstate commerce centers on a determination of whether the tangible subject matter of the case, prescription drugs, were in the flow of interstate commerce at the point at which the Petitioners allegedly agreed to restrain their flow through the establishment of uniform pricing of them. Counsel for Respondent admitted that the case was not based jurisdictionally on the existence of a direct and substantial effect on interstate commerce caused by the Petitioners' actions and such posture of the case is reflected in the absence from the record below of any proof, or instructions by the trial court, which would have been applicable to such a jurisdictional basis. This is strictly a "flow" case.[5]

Prescription drugs are the subject matter of this case. The theory of Respondent's case was that the Petitioners conspired to restrain the flow of such drugs in interstate commerce by restraining the flow thereof after they had entered northern California. Under California law prescription drugs may be dispensed only by a pharmacist duly registered to practice his profession in the State of California, and then only pursuant to the prescripton order of a duly licensed physician.[6] In fact, the dispensing of prescription

[5] R., Vol. III, 1008, 1028.

[6] R., Vol. I, 129, 149-150, 173, 259, 260-261; Vol. III, 956-957, 975, 984-985;

For provisions of California and Federal law which strictly channel the movement of prescription drugs, insofar as drawn in question in this case, into the hands of individual patients only through duly registered pharmacists, subject to the condition that no movement takes place except pursuant to the order of a duly

drugs, here questioned, other than pursuant to the foregoing procedure is a criminal act in California.[7]

The medicinal substances which are the physical matter contained in the prescription drugs in this case were manufactured by drug manufacturers located outside the State of California, including Eli Lilly and Company.[8] It is not the flow in interstate commerce of such substances which the Petitioners are charged with having conspired to restrain but rather an alleged flow in interstate commerce from registered pharmacists to patients, at the consuming level, of prescription drugs containing such medicinal substances which the Petitioners are charged with having restrained.[9]

The great majority of the medicinal substances which are the physical matter contained in the prescription drugs involved in this case, after being manufactured outside the State of California, were sold and shipped either to manufacturers' branch drug warehouses and drug wholesalers, or to pharmacies, all within the State of California. In turn, those medicinal substances received by manufacturers' branch drug warehouses or by drug wholesalers were sold and shipped to pharmacies in northern California where they were held for dispensing and sale to consuming patients. As provided by the laws of California, medicinal substances employed in prescription drugs do not travel in a con-

licensed physician, see Business and Professions Code of the State of California, Chapter 9, Article 1, Secs. 4000, 4008, 4008.2, 4008.3, 4031, 4033, 4035, 4036, 4037, 4040, 4046, 4050, 4054, 4080, 4085, and the Federal Food, Drug, and Cosmetic Act, June 25, 1938 c. 675, § 1, 52 Stat, 1040, as amended, *et seq.*, 21 U.S.C. Section 301, *et seq.*

[7] R., Vol. I, 75, 173; Vol. III, 957.

[8] R., Vol. I, 121-159; 159-179.

[9] R., Vol. I, 7-9, 66-72, 140-41.

tinuous movement from their manufacturers to patients in northern California but rather their movement is interrupted when they reach the pharmacist's shelf and may begin again only when a physician issues a prescription order calling for them.[10] In substance the physician functions as an interrupter of any continuous movement of such medicinal substances. All the foregoing was done strictly in accordance with applicable federal and state statutory provisions and in accordance with the regulations of the California State Board of Pharmacy.[11]

Of the prescription drugs involved in this case there were literally none whose constituent medicinal substances were moved in interstate shipments from their manufacturers to pharmacies in northern California in response to existing prescription orders for prescription drugs calling for them as the physical ingredient.[12] Quite the opposite, such medicinal substances were moved only to meet the normal requirements of physicians' prescription orders calling for their employment. The drug manufacturers recognized that such substances, as are involved in this case, could never be consumed by patients unless and until a prescription order authorizing their use had been issued by a duly licensed physician and submitted to a duly registered pharmacist. The determination of whether such substances would be dispensed in prescriptions, therefore, was by law solely and completely within the discretion of the

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[10] Business and Professions Code of the State of California, Sec. 4036.

[11] R., Vol. I, 75; Vol. III, 956, 957, 968-69, 975, 984-85.

[12] R., Vol. I, 130, 260-61; Vol. II, 592-93; Vol. III, 955-56, 975, 984.

prescribing physician.[13] Drug manufacturers realized that the continuous and uninterrupted movement of their medicinal substances to patients was impossible. Necessarily, as provided by California law, the prescribing function of the physician as the prescriber of prescriptions calling for such substances acted as a complete interruption and barrier to their continuous flow to patients. Consequently, such manufacturers placed their main sales promotion emphasis on persuading physicians by the force of reason to issue prescription orders calling for such substances.[14]

The Learned Profession of Pharmacy

A second jurisdictional issue in this case concerns the effect on the case of the status of the northern California pharmacist as a member of a learned profession. The laws of the State of California declare that pharmacy is a profession[15] and provide for the adoption of rules of professional conduct appropriate to the establishment and maintenance of a high standard of integrity and dignity in the profession.[16] Provision also is made for professional educational attainments and practical knowledge as conditions precedent to an individual's being duly registered as a pharmacist pursuant to the laws of the State.[17]

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[13] R., Vol. I, 129, 149-150, 173, 259, 260-61; Vol. III, 956-57, 975, 984-85.

[14] R., Vol. I, 129-130, 149, 179 *et seq.*, 189, 191, 199 *et seq.*, 250 *et seq.*, 259, 260; Vol. II, 589 *et seq.*

[15] Business and Professions Code of the State of California, Sec. 4046.

[16] *Ibid*, Sec. 4008.2.

[17] *Ibid*, Sec. 4085.

Petitioner Hedgpeth was and is a duly registered pharmacist engaged in the practice of pharmacy in the State of California.[18] The Petitioner pharmaceutical association was and is a professional association. All its affairs were carried on pursuant to the duly voted authorization of its members who were registered pharmacists, who alone had the right to vote.[19]

As provided by the laws of the State of California, only registered pharmacists may receive money from patients for prescription drugs.[20]

Conspiracy

One of the fundamental issues involved in this case is whether the existence of the conspiracy charged was proved as a matter of law.

Evidence was elicited that Petitioner Hedgpeth had formulated a prescription pricing schedule before the period of the conspiracy charged, which schedule he used as a pricing guide in his own practice, and thereafter used his experience in formulating such schedule to create a suggested prescription pricing schedule of a similar nature which was published and distributed to members of the Petitioner Association at its instance.

In connection with such distribution, oral and written statements were made to the members of Petitioner Association urging that such schedule be "used" by

[18] R., Vol. I, 4; Vol. II, 673-74.

[19] Prosecution Exhibits 6-B and 6-C. Citations to the Exhibits in this case hereafter will be styled "Plaintiff's Exhibit ——" and "Defendants' Exhibit——".

[20] Business and Professions Code of the State of California, Sec. 4050; R., Vol. I, 173, 259; Vol. III, 956-57.

them in their daily practice as pharmacists. Basically, the issue of conspiracy turns on the determination as to whether such members were urged to "use" such schedule as a mechanical means, in whole or in part, in the calculation of prescription prices, or whether such members were urged to "use" such schedule as a guide or suggested means of calculation.

Within the profession of pharmacy in northern California, and in accordance with the methods of instruction which have long been employed by the University of California College of Pharmacy,[21] registered pharmacists have used prescription pricing schedules as aids or guides in the calculation of total prescription charges.[22] Many such prescription pricing schedules, which are identical in character to those directly involved in this case, have been available for use and used by registered pharmacists in northern California.[23]

A survey of prescription drug prices charged by members of the Petitioner Association during the period January 1, 1959, through May 31, 1959, conducted by an independent survey company for the Association in April and May, 1961, plainly showed a complete lack of uniform prescription pricing during

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[21] Defendants' Exhibits X-1 through X-5, R., Vol. III, 887-89.

[22] R., Vol. I, 321; Vol. II, 498, 680; Vol. III, 920-926, 930, 932, 940, 957, 964.

[23] Defendants' Exhibit C, R., Vol. I, 320-21; Defendants' Exhibit J, R., Vol. II, 688-89, 691; Defendants' Exhibit K, R., Vol. II, 691-92; Defendants' Exhibit M, R., Vol. II, 718, 720; Defendants' Exhibit N, R., Vol. II, 722-23; Defendants' Exhibits R-1 through R-31, R., Vol. III, 792, 795-96, 798; Defendants' Exhibit 2, R., Vol. III, 957-59.

such period.[24] In this connection, it is noted that the conspiracy charged was alleged to have existed continuously from the fall of 1956 through the period of such survey,[25] a period of existence of over two and one-half years. During these two and one-half years, two of the pricing schedules complained of, bearing issue dates of January 28, 1957,[26] January 28, 1958,[27] were widely distributed to practicing registered pharmacists who were members of the Petitioner Association.

Rule of Reason

Correlative to the question as to whether the existence of the alleged conspiracy was proved, is the further question as to whether Petitioners' actions were justified under the so-called "Rule of Reason"[28] as being reasonable efforts to induce self-regulation in prescription pricing among registered pharmacists in northern California.

It is commonly known and the evidence showed that pharmacists in northern California generally dispense hundreds of prescriptions daily and consequently for some time have had a basic need for a type of suggested prescription pricing aid which at a glance would assist them in determining the proper charge for each pre-

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[24] Defendants' Exhibit E, R., Vol. II, 408-09; Defendants' Exhibits Y-1 through Y-25, Vol. III, 912-13.

[25] R., Vol. I, 7.

[26] Plaintiff's Exhibit 1, Vol. I, 228.

[27] Plaintiff's Exhibit 2, Vol. I, 234.

[28] *United States* v. *Columbia Pictures Corporation*, 189 F. Supp. 153 (D.C.S.D.N.Y., 1960); *United States* v. *Morgan*, 118 F. Supp. 621 (D.C.S.D.N.Y., 1953); *Appalachian Coals* v. *United States*, 288 U.S. 344 (1933); *Board of Trade* v. *United States*, 246 U.S. 231 (1918).

scription dispensed to a patient. Specifically, they have had a need for a pricing aid which would assist them in calculating total charges or prices for prescriptions while at the same time assuring that included in such total charges or prices there would be a charge or price increment representing a reasonable fee for their individual professional services. All three of the suggested pricing schedules directly involved in this case reflect such an increment in terms of a professional fee and there have been many suggested prescription fee schedules, identical in character to the schedules in this case, available for use as the pharmacist saw fit in his practice, throughout the United States, including northern California.[29] Not only has the use of suggested prescription fee schedules as guides to calculation in pricing long been a subject of instruction in a standard textbook used in colleges of pharmacy in the United States[30] but in particular the curriculum of the University of California College of Pharmacy has contained such instruction for some time.[31]

Considering the need for, the use of, and the established professional education in the use of suggested prescription fee schedules as the background and context of this case, the Court's attention is invited to certain representations made to members of the Petitioner Association concerning schedules of this type. On January 21, 1956, for instance, members of the Petitioner Association were urged to acquaint themselves

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[29] Defendants' Exhibit C, R., Vol. I, 320-21; Defendants' Exhibit J., R., Vol. II, 688-89, 691; Defendants' Exhibit K., R., Vol. II, 691-92; Defendants' Exhibit M., R., Vol. II, 718, 720; Defendants' Exhibit R-1 through R-31, R., Vol. III, 792, 795-96, 798; Defendants' Exhibit Z., R., Vol. III, 957-59.

[30] Defendants' Exhibit V; R., Vol. III, 876, 878.

[31] Defendants' Exhibit X-1, through X-5, R., Vol. III, 887-89.

with the prescription pricing schedules then available from numerous sources and it was urged that each pharmacist select one or create his own and use it.[32] On January 26, 1957, Petitioner Hedgpeth stated that he took full responsibility for his suggested prescription pricing schedule and if it fitted the needs of anyone's personal business he offered it for their consideration.[33] Copies of the schedule were to be purchased by the Association in order that they could be made availabe to the members for their study.[34]

In March, 1957, it was stated to persons including the members of the Association that the so-called Hedgpeth pricing schedule indicated the minimum charges for prescriptions peculiar to Hedgpeth's operations and that such schedule was recommended only for study and consideration.[35] Contained in a form letter dated July 15, 1958, which referred to a copy of the 1958 Hedgpeth suggested schedule as being thereto attached, it was stated that such schedule was being widely adopted throughout northern California as an aid to calculations and that stores were using it as a guide in pricing their prescriptions.[36] In January and May, 1959, finally, the statements were made that the so-called Hedgpeth schedules were available as guides to prescription pricing[37] and that each member could help build more public confidence in his profession by using the Hedgpeth schedule as a guide.[38]

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[32] Plaintiff's Exhibit 7, R., Vol. I, 215-17.

[33] Plaintiff's Exhibit 13, R., Vol. I, 215, 217; Vol. II, 398-99.

[34] *Ibid.*

[35] Defendants' Exhibit P, R., Vol. II, 735-38.

[36] Plaintiff's Exhibit 25, R., Vol. I, 303.

[37] Plaintiff's Exhibit 30, R., Vol. II, 366-67, 369.

[38] Plaintiff's Exhibit 42, T., I, 348.

Charge to the Jury

The trial court instructed the jury that if they found a conspiracy existed to fix prescription pricing, they would be justified in finding the Petitioners guilty as charged.[39] After the jury had retired from the courtroom counsel for Petitioners took exception to the foregoing charge on the ground that the court failed to instruct the jury further that to constitute unlawful conduct it must have been a conspiracy in restraint of interstate commerce.[40] Thereafter, the trial court recalled the jury and instructed them further that if they should find interstate commerce was not present in the case their verdict should be for acquittal.[41] Counsel for Petitioner again objected on the ground that the court should have withdrawn its original charge and then should have instructed the jury on both conspiracy and interstate commerce at the same time.[42]

REASONS FOR GRANTING THE WRIT

Important and Unsettled Federal Questions, Concerning the Application of Section 1 of the Sherman Act to Practicing Pharmacists Throughout the United States, Should Be Settled by the Pronouncement of This Court

The basic questions presented in this case are identical to those currently involved in three cases[43] now pending in United States District Courts in California, Arizona and Idaho, and to the basic questions in-

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[39] R., Vol. III, 1052-53.

[40] R., Vol. III, 1056-57.

[41] R., Vol. III, 1060-61.

[42] R., Vol. III, 1061.

[43] *United States* v. *Northern California Pharmaceutical Association and Donald K. Hedgpeth*, Civil Action No. 39629, U.S.D.C. N.D. Cal., S.D.; *United States* v. *Arizona Pharmaceutical Associ-*

volved in a direct appeal now pending before this Court from the judgment of the United States District Court for the District of Utah, Central Division.[44] Each of the foregoing cases has arisen under Section 1 of the Sherman Act[45] and each draws in question the jurisdictional reach of the Sherman Act and its application to the learned profession of pharmacy.

As the final authority on the proper interpretation of Federal legislation this Court should declare the principles governing the common questions presented in these cases. Such a declaration would furnish the district courts with guidelines for the uniform application of the controlling rule of law and may make possible the elimination of unnecessary litigation. Such important considerations merit the attention of this Court.

The Judgment of the Court Below Declaring That a Flow of Interstate Commerce Was Present Misapplies Controlling Principles Previously Announced by This Court

The question here presented in respect of interstate commerce is jurisdictional. Unless the conspiracy was shown to have been in restraint of the flow of interstate commerce there could be no violation of the Sherman Act in this case.

The Indictment charged that the Petitioners conspired to establish and maintain uniform prices for

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ation, Maricopa County Pharmaceutical Association, and Tucson Pharmaceutical Association, Civil Action No. 3367-Phx, U.S.D.C. Ariz.; and *United States* v. *Idaho State Pharmaceutical Association, Inc.*, Civil Action No. 3654, U.S.D.C. Ida., S.D.

[44] *Utah Pharmaceutical Association* v. *United States*, 201 F.Supp. 29 (D.C.D. Utah, C.D., 1962), in which the Jurisdictional Statement was filed this date in this Court.

[45] 15 U.S.C. Section 1.

prescription drugs dispensed to consumers in northern California.[46] It is to be noted particularly that the dispensing transactions which were drawn in question by the Indictment were between registered pharmacists in northern California and consuming patients in northern California, and therefore wholly intrastate in character.

The existence of a restraint upon the flow of interstate commerce must be determined by examining the point in commerce at which the restraint or pinch occurred.[47] As noted, the point at which the restraint, if any, took place herein was the point at which registered pharmacists dispensed prescriptions to patients in northern California.

Whether the flow of interstate commerce was present in the dispensing transactions between pharmacists and consuming patients, the point at which the alleged restraint occurred, presents an important federal question as to the interpretation of the Sherman Act which this Court should settle. This is particularly so since the decision of the court below determined the presence of interstate commerce in the case upon a misapplication of controlling principles previously announced by this Court.[48] This Court determined in *Eli Lilly And*

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[46] Indictment, p. 5; R., Vol. 1, 7-9.

[47] *United States* v. *Women's Sportswear Mfrs. Asso.*, 336 U.S. 464 (1949).

[48] In *Binderup* v. *Pathe Exchange, Inc.*, 263 U.S. 291 (1923) the Court declared that the intention of the parties was controlling on the issue of interstate commerce. In *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564 (1943) the presence or absence of a prior order was controlling on that issue. Under the principles announced in *Binderup* and *Walling* interstate commerce clearly was not involved in this case.

Co. v. *Sav-On-Drugs, Inc.*[49] that dispensing transactions between pharmacists and patients take place solely in intrastate commerce insofar as the exercise of state police power is concerned. While this Court has never determined the precise question as to whether the dispensing of a prescription by a pharmacist to a patient is wholly intrastate in character, for the purposes of Section 1 of the Sherman Act, the decision in *Eli Lilly And Co., supra*, would appear to be very persuasive in this case.

As additional authority persuasive in this case, the Court's attention is invited to the decision of the Ninth Circuit Court of Appeals in *Page* v. *Work*.[50] The Court there held that the laws of the State of California, in providing for the local regulation of legal advertising, effectively created a relevant market in legal advertising which was solely in intrastate commerce. The Petitioners herein contend that the laws of California similarly created a wholly intrastate "market" in prescription drugs which at no time entered the channels of Interstate Commerce.

The Court should declare whether California through its pharmacy laws governed the conduct of the persons and the movement of drugs within the state in such a manner as to make such conduct and the movements of such drugs take place wholly in intrastate commerce. The Court's determination of such matter would provide a fundamental interpretation of the Sherman Act as based on the facts in this case.

In *United States* v. *Sullivan*[51] this Court upheld the power of Congress under the Commerce Clause to pro-

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[49] 366 U.S. 276, 278 (1961), reh. den. 366 U.S. 978 (1961).

[50] 290 F. 2d 323 (C.A. 9th, 1961); cert. den. 368 U.S. 875 (1961).

[51] 332 U.S. 689 (1948).

vide in the Federal Food, Drug, and Cosmetic Act[52] that the sale of a prescription drug, as opposed to its proper dispensing pursuant to a prescription, after shipment in interstate commerce is a criminal act of misbranding. This Court now should determine whether the reach of the Sherman Act extends beyond the event considered in *Sullivan* (misbranding as a result of the sale of a prescription drug) and regulates the dispensing of prescription by a pharmacist to a patient, a wholly intrastate activity.

The Court Should Determine Whether the Practice of Pharmacy in California, as Delineated in the Indictment, Constitutes the Practice of a Learned Profession and, If So, Whether the Activities of the Petitioners Were Within the Purview of Section 1 of the Sherman Act

While this Court has determined that members of a profession violate the Sherman Act where they seek to restrain a business,[53] it has never determined whether the restraint of a profession by its members[54] or the suggestion of a fee schedule by members of a profession, including attorneys and dentists,[55] are within the purview of the Sherman Act.

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[52] Act of Congress of June 25, 1938, c. 675, § 1, 52 Stat. 1040, *et seq.*, as amended, 21 U.S.C. Section 301, *et seq.*

[53] *United States* v. *American Medical Ass'n*, 28 F. Supp. 752 (1939), cert. den. 308 U.S. 599-600 (1939); cf., *Ibid*, 110 F. 2d 703 (1940), cert. den. 310 U.S. 644 (1940); 130 F. 2d 233 (1942), aff'd 317 U.S. 519 (1943).

[54] *United States* v. *National Asso. R.E.B.*, 339 U.S. 485, 491-492 (1950).

[55] See the Petitioners' offers of proof concerning the Minimum Fee schedule of the San Francisco, California Bar and the Veterans Administration fee schedule used by the dental profession in the San Francisco, California area; R., Vol. I, 76-77.

This Court previously has considered the criteria for determining whether a given group is engaged in the practice of a profession.[56] In the present case it is aided in that consideration by the legislative declaration of the State of California that the practice of pharmacy is a profession.[57] California also has provided for the enactment of rules of professional conduct appropriate to the establishment and maintenance of a high standard of integrity and dignity in the profession of pharmacy.[58] If, as contended by the Petitioners herein, they were engaged in activities bearing on the practice of the profession of pharmacy in suggesting a pricing schedule for members, the Court should determine whether that conduct is subject to the purview of Section 1 of the Sherman Act. It is especially important that this question be resolved by the Court at this time since the resolution thereof is of vital interest to practicing pharmacists through the United States. As has been noted, this same basic issue is presented not only in this petition for certiorari and in the appeal of the Utah Pharmaceutical Association[59] but also is involved in litigation now pending in Arizona, Idaho and California.[60]

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[56] *United States* v. *Laws*, 163 U.S. 258, 266 (1896); *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427, 435-436 (1932).

[57] Business and Professions Code of the State of California, Section 4046.

[58] *Ibid.*, Section 4008.2.

[59] See Footnote 44, *supra*.

[60] See Footnote 43, *supra*.

It Is Important That the Court Declare Whether Proof of the Publication and Distribution of a Particular Prescription Pricing Schedule, Standing Alone, Establishes a Violation of Section 1 of the Sherman Act

In the present case, the pending appeal, and in three cases presently pending in Federal District Courts,[61] six pharmaceutical associations and Petitioner Hedgpeth are respectively alleged to have engaged in a conspiracy to restrain the flow of interstate commerce by reason of their publication and distribution of particular prescription pricing schedules. In each of the cases a basic question is whether or not proof of the publication and distribution of such prescription pricing schedules, standing alone, is sufficient to establish a violation of Section 1 of the Sherman Act.

Under the prior decisions of this Court it would seem to be clear that no violation of the Sherman Act can be established merely by proof of publication and distribution unless the prosecution goes further and shows co-aspiratorial activity additional thereto.[62] In the present case Petitioners maintain that Respondent's proof was insufficient as a matter of law to establish the alleged conspiracy. Since 1828 most practicing pharmacists have utilized prescription pricing schedules. Today, student pharmacists are taught by the schools of pharmacy how to "use" a prescription pricing schedule, and there are many prescription pricing

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[61] See Footnotes 43 and 44, *supra*.

[62] *Plymouth Dealers' Ass'n of No. Cal.* v. *United States*, 279 F. 2d 128, 132, (C.A. 9th, 1960); *United States* v. *Nationwide Trailer Rental System, Inc.*, 156 F. Supp. 800, 804, aff'd *per curiam*, 355 U.S. 10 (1957).

schedules available for "use" and "used" by pharmacists.[63]

In light of the foregoing it is important that there be a resolution of this question and a declaration of the applicable rules of law by this Court at this time so as to afford appropriate guidance for the lower Federal judiciary.

The Applicability of the So-Called "Rule of Reason" to the Activities of the Petitioners, as Reasonable Efforts to Induce Regulation in Prescription Pricing Within Pharmacy, Is Correlative to the Issue of Conspiracy and Should Be Determined at This Time

Under the prior decisions of this Court an admitted restraint is not a violation of the Sherman Act under the "Rule of Reason" unless it is held to be an unreasonable restraint.[64] As proposed by the Petitioners herein a particular prescription pricing schedule was made available not as an instrument of economic restraint but merely as a much needed aid, tool, and guide for pharmacists who otherwise would have been overburdened with the multiplicity of medicinal substances and the proper professional calculation of separate charges to be made for prescriptions calling for such medicinal substances. As such, the Petitioners maintain, the pricing schedule was not an unreasonable restraint of trade, and this Court should so declare for the same reasons set forth with regard to the issue of conspiracy.

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[63] R., Vol. III, 822-25; Defendants' Exhibit S; R., Vol. III, 824-26; Defendants' Exhibits C, J, K, M, R-1 through R-31, Z; R., Vol. I, 320-21; Vol. III, 688-89, 691-92; Vol. II, 720; Vol. III, 792, 795-96, 798; Vol. II, 957-59; R., Vol. III, 888, 989.

[64] See Footnote 28, *supra*.

The Court should resolve in this case whether the Petitioners engaged in activities consonant with that policy favoring reasonable competition embodied in the Sherman Act.[65] The resolution of such question would have the effect, beyond determining the Petitioners' rights in the present case, of deciding in large part the underlying issue of whether pharmaceutical associations as a whole may lawfully purport to induce self-regulation in the calculation of professional fees within pharmacy as do medical and legal professional associations within medicine and law and thereby seek to benefit the profession and the patient or client as the case may be.

For the Guidance of the Federal Judiciary in the Trial of Antitrust Cases This Court Should Clarify the Proper Manner in Which the Trial Court Should Proceed to Charge Further a Petit Jury to Correct an Acknowledged Error in Its Prior Instructions

In its original instruction to the jury on the issue of conspiracy, the trial court instructed the jury in effect that a finding of guilty could be based on a finding that a conspiracy existed to fix prescription pricing. In giving such original instruction the trial court did not at the same time instruct the jury that a finding of guilty of conspiracy could be based only upon a related finding that interstate commerce was present in the case. This Court should declare whether the trial court committed prejudicial error in not instructing the jury on both conspiracy and interstate commerce at the same time. The Court also should determine

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[65] See Footnote 28, *supra*; see also *Roofire Alarm Co.* v. *Royal Indemnity Co.*, 202 F.Supp. 166, 169 (D.C.E.D. Tenn., S.D., 1962); *John Wright & Associates, Inc.* v. *Ullrich*, 203 F.Supp. 744, 750-751 (D.C.D. Minn., Third D., 1962).

whether the trial court cured such prejudicial error when it gave the jury a supplemental instruction on the issue of interstate commerce which made no reference to the issue of conspiracy without having first withdrawn the erroneous original charge.

By making such pronouncements, this Court would provide guidance for the federal judiciary as to the proper manner in which to charge a petit jury further in an antitrust case in order to correct an acknowledged error in prior instructions.[66]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[66] *Mills v. United States*, 164 U.S. 644, 649 (1897); *Congress and Empire Spring Co. v. Edgar*, 99 U.S. 645, 659 (1879); *New York, L.E. & W. Ry. Co. v. Estill*, 147 U.S. 591, 614 (1893).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17,549
June 27, 1962

NORTHERN CALIFORNIA PHARMACEUTICAL ASSOCIATION, a Corporation, and DONALD K. HEDGPETH, *Appellants*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before: ORR, HAMLEY and MERRILL, Circuit Judges.

ORR, Circuit Judge:

Appellants stand convicted of violation of § 1 of the Sherman Antitrust Act, 15 U.S.C.A. § 1 et seq. The indictment charges a combination and conspiracy in restraint of trade and commerce among the several states during the period 1956-1960, consisting of "a continuing agreement, understanding and concert of action among the defendants, co-conspirators, and others to the grand jurors unknown, the substantial terms of which have been and are that they agree:

(a) To establish and maintain uniform prices for prescription drugs sold to consumers in northern California; [and]

(b) To adopt the prescription pricing schedule formulated by [appellant] Hedgpeth . . . ."

Northern California Pharmaceutical Association (hereinafter the "Association") is an incorporated California trade association with headquarters at San Francisco. It

has more than 1500 retail pharmacist members, of whom almost three-fourths own and operate their own pharmacies. An annually elected executive board composed of officers and directors is responsible for the conduct of Association affairs. Among other corporate purposes, the Association is "[t]o provide means whereby retail druggists by united or concerted action can and may do such things as will tend to promote . . . their mutual and common interests."

Donald K. Hedgpeth is the owner and operator of West Coast Drug Company, a San Francisco pharmacy. From 1956 to 1960 he served as chairman of the "Suggested Prescription Pricing Schedule Committee" (hereinafter the "Pricing Committee"), organized by the Association's executive board. During this period he formulated and presented to the Committee for its consideration and action a "Suggested Prescription Schedule for Non-Compounded Prescriptions" (hereinafter the "Hedgpeth Schedule").

The appeals before us present numerous grounds. We consider them in order.[1]

I. *The Charges Against Appellant Hedgpeth.*

Starting with a challenge to the sufficiency of the indictment and building from there, we proceed. It is argued for the first time in appellants' closing brief and was not assigned in appellants' specification of errors that the charges against Hedgpeth are based upon activities carried on by him solely in a representative capacity as an official of the Association. It is said that action taken in such a capacity can be reached only by indictment under § 14 of the Clayton Act, 15 U.S.C.A. § 24. Several District Court cases, some of which are now before the Supreme Court for

[1] The facts are of course viewed in the light most favorable to the Government, which had judgment below. See *Glasser* v. *United States*, 315 U.S. 60, 80 (1941) and *Cellino* v. *United States*, 276 F.2d 941 (9th Cir. 1960).

review, are cited in support of this proposition.[2] We note that in said cases it appears beyond doubt from a reading of either the indictment, a bill of particulars, or a stipulation, that the moving defendants were in fact charged "solely in a representative capacity." In the instant case the indictment, stipulation, and proof reveal that the charges against Hedgpeth are based on acts performed in most part in an individual capacity with few exceptions of a dual capacity. He is described in the indictment as an independent pharmacist, as a past president of the Association, and as chairman of the latter's pricing committee. The stipulation describes him solely as an independent pharmacist. The proof shows that he offered to and in fact did himself formulate and from time to time revise the "Hedgpeth Schedule", proceeding in part at least on formulae which he had personally devised years before. It also appears that he used this pricing schedule in his own pharmacy. The mere fact that Hedgpeth is also described in the indictment as an official of the Association, "does not mean that [his] conduct as such [official] is complained of, but rather [he is] charged as [an individual] together with the [Association] with violations of the Sherman Anti-Trust Act." *United States* v. *General Motors Corp.*, 26 F. Supp. 353 (N.D. Ind. 1939), *affirmed*, 121 F.2d 376 (7th Cir. 1941), *cert. denied*, 314 U.S. 618 (1942).[3]

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[2] See, e.g., *United States* v. *National Dairy Products Corp.*, 196 F. Supp. 155 (W.D. Mo. 1961), *prob. juris. noted, sub. nom. United States* v. *Wise*, 368 U.S. 945 (1962). But see *contra, United States* v. *American Van Lines*, 1962 Trade Cases, para. 70,213 (D. D.C.), and *United States* v. *Packard Bell Elec. Corp.*, ... F. Supp. .... (S.D. Cal., 1962).

[3] *Accord: United States* v. *Atlantic Commission Co.*, 45 F. Supp. 187, 194 (E.D.N.C. 1942). See also, *United States* v. *Winslow*, 195 Fed. 578, 581-582 (D. Mass. 1912).

II. *Appellants' Motion for Change of Venue.*

Appellants were indicted and arraigned in the latter half of December, 1960. In late January, 1961, they entered pleas of not guilty. In mid-March they presented two motions for a continuance, the second of which ultimately resulted in a postponement of the trial date until almost the beginning of June. On March 24th, appellants moved under F.R.Cr.P., rule 21 (a), 18 U.S.C.A. for a change of venue. The purported grounds for the motion were great community bias and prejudice alleged to have been caused by newspaper reports of certain remarks made by the judge who heard and granted the second motion for a continuance. During the course of that hearing, the judge in giving reasons against any further delay in going to trial said:

"If the charges or the allegations made by the Government in this indictment are true, it means that every person who has ever paid for a prescription drug during the period which is within the statute of limitations has a treble-damage anti-trust action."

These remarks, accompanied by innocuous commentary, were carried by four Bay Area newspapers in editions which appeared immediately after the hearing. The articles were not remotely inflammatory and one undertook to challenge the court's views on the question of private suits. Apparently appellants' contention is that some readers of said reports would conceive the idea that it would redound to their interest if appellants were convicted. No abuse of discretion on the part of the trial court in denying the motion appears. See *Callanan* v. *United States*, 223 F.2d 171 (8th Cir.), *cert denied*, 350 U.S. 862 (1955).

The mere general showing of publicity thought to be adverse to a party is not sufficient to require a change of

venue except in the most extraordinary cases.[4] In the usual situation, the movant must at least make a showing that the allegedly prejudicial material reached the veniremen, so that a foundation is laid for the possibility of actual bias. *Blumenfield* v. *United States*, 284 F.2d 46 (8th Cir.), *cert. denied*, 365 U.S. 812 (1961). Not only have appellants failed to show that any juror read, much less remembered these reports, the *voir dire* examinations of the jurors are not before us. The factors of, (a) the two and one-half month lapse from publication to trial,[5] (b) the routine nature of the reports,[6] (c) the size and general news inundation of the community,[7] (d) the precautionary instruction given on the subject by the trial court,[8] and (e) the trial court's finding of a resultant substantial burden on the parties and numerous witnesses if the motion were granted, amply sustain the denial of the motion.

III. *Professional Status as a Defense Under the Sherman Act in the Case of an Agreement to Fix Prices.*

Appellants claim for themselves an exemption from the Sherman Act by reason of their alleged status as "professionals." The gist of their argument is that the prac-

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[4] Compare *Finnegan* v. *United States*, 204 F.2d 105 (8th Cir.), *cert. denied*, 346 U.S. 821 (1953), *Shockley* v. *United States*, 166 F.2d 704 (9th Cir.), *cert. denied*, 334 U.S. 850 (1948), and *Shushan* v. *United States*, 117 F.2d 110 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941), with *Delaney* v. *United States*, 199 F.2d 107 (1st Cir. 1952).

[5] Compare *Bianchi* v. *United States*, 219 F.2d 182 (8th Cir.), *cert. denied*, 349 U.S. 915 (1955).

[6] See *United States* v. *Bletterman*, 279 F.2d 320 (2d Cir. 1960).

[7] Compare *Rakes* v. *United States*, 169 F.2d 739 (4th Cir.), *cert. denied*, 335 U.S. 826 (1948).

[8] See *Reynolds* v. *United States*, 225 F.2d 123 (5th Cir.), *cert. denied*, 350 U.S. 914 (1955).

tice of pharmacy is a "learned profession," and that the activities with which the instant indictment charges them are merely reasonable regulations of various aspects of that "profession". Appellants' evidence tends to establish that in certain limited respects the practice of pharmacy, (as presently practiced at the local retail level,[9]) could be characterized at least as "quasi-professional." To understand why that fact is nevertheless utterly irrelevant in the *instant* case, it is necessary to review the nature of the present charges and the Government's establishment of a *prima facie* case of an agreement to fix prices in a commodity.

The indictment charges a classic case of an agreement to fix prices in a commodity, to wit, a prescription drug. Although dispensed by one who requires special training for some aspects of his occupation, the prescription drug no less than the law book, the text on bacteriology, or the handbook on accounting, is an article of trade or commerce. Simply because the prescription drug is potentially dangerous if taken in the wrong amounts or by the wrong people and is therefore subject to close public regulation in many respects, does not change the character of the drug or put every action of its handlers beyond the reach of the Sherman Act. Compare *Dr. Miles Medical Co.* v. *Park & Sons, Co.*, 220 U.S. 373, 404 (1911). It is evident that what is involved here is a plain and simple agreement to fix prices, as will more fully appear, *infra*, under our discussion of the sufficiency of the evidence of an agreement. We deem it advisable at this point to sketch the Government's basic proof regarding the make-up of the price of a prescription drug.

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[9] The record shows that the practice of pharmacy has, with many other special skills in our society, progressively succumbed to the demands of mass production and mass merchandising in the industry which it serves.

The charges and proof center around the handling and pricing of what is defined in the indictment as a "precompounded prescription drug." This is a drug which passes from the manufacturer through the hands of the local pharmacist without undergoing further compounding or basic change in form. It is established that these drugs are handled by manufacturer, warehouseman and wholesaler in much the same way as is any other commodity. Final distribution of such drug by the retailer involves the receipt of a prescription and an occasional re-labelling of the drug and a breakdown in quantity. The hired pharmacists who do this work are unionized and are on straight-time wages.

That it is first and foremost a "price" in the classic sense which is involved in appellants' schedule appears from the testimony of several of appellants' witnesses:

The Defendant Hedgpeth:

"Q. And the pharmacist who fills the prescription gets a wage, doesn't he?

A. That is right.

Q. This is what you're negotiating about all the time?

A. Yes.

Q. And I believe you testified that when wages go up the schedule went up; is that right?

A. That is correct, yes sir."

. . . . .

"The Court: That [price] is the amount that is paid to the owner of the store, isn't it?

The Witness: Yes, sir.

The Court: So the man, the pharmacist, the licentiate, he doesn't get any more or any less, according to this schedule, than the wages he is paid by the storeowner,

unless, of course, he owns the business or has an interest in the business.

The Witness: I couldn't answer that for all stores, sir. I know in my store it is a wage."

Ward Falor:

"Q. And when you say you use a schedule, what do you mean by the use of a schedule?

A. Well, you have got to ascertain within some rough figure what the price of the prescription is going to have to be in order to come out on it. You have got your pharmacist to pay, your overheard, and all your other little incidentals that happen to come in there, and you have either got to set a figure on that or charge a flat professional fee and give the medicine to the customer for nothing."

Morris Boynoff:

"Q. . . . what is your formula for pricing?

A. Well, my formula is essentially predicated on return of the ingredients cost plus a fee for my services."

In short, it is in an area of "entrepreneurial," rather than professional activity, that appellants are charged with having run afoul of the Sherman Act. Compare *United States* v. *Women's Sportswear Ass'n*, 336 U.S. 460, 463-464 (1949). To a *prima facie* case of an agreement to fix prices in a commodity, very limited defenses are open to appellants.

Much authority exists demonstrating that reasonableness is no defense to a case of price-fixing. See, e.g., *Northern Pacific R. Co.* v. *United States*, 356 U.S. 1 (1958). Rather, appellants may attempt to show only that what is proven is in fact *not a price-fixing agreement*, but rather is: (a) a narrowly defined and reasonable regulation of a subject

such as the hours of trading,[10] (b) a reasonable reform of *non-price* industry practices generally,[11] or (c) a regulation of trade, commerce or a profession required, or specifically authorized and controlled, *by law*.[12] In short, there is no defense to *price-fixing* on the ground that it is reasonable or that it is being done by professionals. Appellants' "professional" status *per se* will not protect them if the activity in which they are shown to have engaged is clearly proscribed by the statute. *American Medical Ass'n* v. *United States*, 317 U.S. 519 (1943).

The evidence and instructions offered by appellants as a defense to the *prima facie* case of price-fixing were properly rejected as irrelevant to any of the possible defenses just outlined. A very great volume of this evidence was historical, attempting to show the rise and development of the practice of pharmacy,[13] the history of its pricing practices, and the conditions in the trade purportedly requiring orderly central supervision of the pricing structure. None, however, was probative on the question of whether the specific activity proved by the Government was or was not an agreement to fix the price of a commodity.

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[10] *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918).

[11] *Appalachian Coals, Inc.*, v. *United States*, 288 U.S. 344 (1933).

[12] See *Semler* v. *Dental Examiners*, 294 U.S. 608 (1935); *Graves* v. *Minnesota*, 272 U.S. 425 (1926). See also, *American Medical Ass'n* v. *United States*, 130 F.2d 233, 244-245 (D.C.Cir. 1942), *affirmed*, 317 U.S. 519 (1943).

[13] Some of the excluded evidence, going back to Eighth Century Persia, and including edicts on the practice of pharmacy issued in 1240 by no less a figure than the Holy Roman Emperor, Frederick II, were, needless to say, outside the relevant period covered by the indictment and were properly excluded, in Mr. Justice Holmes' phrase, as "a concession to the shortness of life." See *Reere* v. *Dennett*, 145 Mass. 23, 28, 11 N.E. 938, 944 (1887).

Appellants' attempt to show the need for supervision of the pharmaceutical price structure might on the contrary make a case for the regulation of drug prices *by law*. But here, as in the closely analogous case of *United States* v. *Erie County Malt Beverage Distributors Ass'n*, 264 F.2d 731, 733 (3d Cir. 1959), there is no showing that existing legislation in the field authorizes price fixing in any form. And far from suggesting that public regulation be instituted, appellants suggest that they should be permitted to carry on that regulation with no public overseer. It is precisely such use of uncontrolled private economic and quasi-political power in the market place which the Sherman Act condemns. Such regulatory power, if it is to exist at all, resides under our system in democratically controlled legislatures. The Sherman Act forbids appellants to appropriate a segment of that sovereign power to their private association. *American Medical Ass'n* v. *United States*, 130 F.2d 244-245 (D.C. Cir. 1942), *affirmed*, 317 U.S. 519 (1943).

We do not decide that every action of professionals is within the reach of the Sherman Act. We do decide that an agreement among professionals to fix a commodity price is.

IV. *Restraint on the Flow of Interstate Commerce.*

Admitting that the precompounded prescription drugs which are the subject of the present charges start out in the flow of interstate commerce, appellants argue that later events in the vending of the drugs cause them to be withdrawn from that flow before they reach the ultimate consumer. In considering this contention, we review the relevant facts, stipulations and concessions of the parties.

It is stipulated that of all sales during 1959 of prescription legend drugs by fifteen leading drug manufacturers whose places of manufacture are outside the State of Cal-

ifornia, more than one-fourth, or over $8 million worth of those made in northern California were made by direct shipment to pharmacies which are members of the appellant association." The testimony detailing the over-all pattern of trade in the drug industry is even more instructive. "Detail men," or local sales representatives of the out-of-state manufacturers are constantly at work in northern California, acquainting physicians and pharmacists with new drugs, stimulating interest generally in the firm's products, and urging physicians to prescribe, and pharmacists to order, the manufacturer's goods. One manufacturer, Eli Lilly, even guarantees the ultimate retail sale of its trade-marked products. Another, Abbott Labs, predominates in sales direct to pharmacies without the use of any intermediary. Abbott's marketing surveys show that every year during the relevant period of the indictment more than 90% of the prescriptions sold in northern California were dispensed by pharmacists as manufactured, without any significant change in form. It was shown that from Winthrop Labs some goods were "shipped automatically to the retail pharmacist without him placing an order" with the Labs.

In the case of wholesalers who receive the bulk of their stock of the relevant products from out-of-state, it is shown that their inventory and sales policies are based on anticipated orders from pharmacies, that they have "direct order" phone lines to specific local pharmacists who are their regular customers, and that the flow of goods through their firms is kept at a steady level by the use of "automatic" IBM card inventorying. The retailer, when he receives the drugs, in many cases merely passes on the original package in response to a prescription, re-labelling the package, because to do so "is very good advertising." On some of the packages the manufacturer has placed an easily removable label for this very purpose.

Faced with this pattern of business, appellants in their brief concede that "[a] substantial portion of these drugs came direct to the pharmacies from manufacturers outside the State of California and these drugs are in the 'flow' of commerce certainly up to the point that they reach the pharmacies' storage shelves."

The narrow question with which we are then left is whether as a practical matter, the "flow" must be said as a matter of law to stop before the drugs reach the consumer. Under tests laid down by the United States Supreme Court and on the authority of other closely analogous cases, the answer to that question must be in the negative, at least with respect to the substantial amount of prescription drugs which reach individual pharmacies by direct shipment from out of state.

Although the question thus posed is a narrow one, we are called upon in this Sherman Act case to take the broad view of the business practices disclosed in this record. We are cautioned that "commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905); *Plymouth Dealers' Ass'n v. United States*, 279 F.2d 128, 135 (9th Cir. 1960). We look to see whether from the evidence the jury could reasonably conclude that there was a "practical continuity of movement" of the drugs to the point where the restraint was to be applied. *United States v. Chrysler Corp.*, 180 F.2d 557, 559-560 (9th Cir. 1950). We attempt to determine, not by tracing the erratic movements of a single prescription drug, but by observing the usual course of the whole trade, what ultimate disposition of the product is contemplated by the business people involved. *Pevely Dairy Co. v. United States*, 178 F.2d 363, 366 (8th Cir.) *cert. d nied*, 339 U.S. 942 (1950). It is evident from the record that the jury would be justified in concluding, at least with regard to

direct shipments to California pharmacists from out-of-state sources, that the undivided attention of manufacturer, warehouseman, wholesaler and retailer is upon the ultimate consumer and his immediate aides, the physician and pharmacist, and that there is a "practical continuity of movement" here. *See Las Vegas Merchant Plumbers' Ass'n v. United States*, 210 F.2d 732 (9th Cir.); *Percla Dairy Co. v. United States, supra.*

Nor does state regulation, requiring prescriptions and limiting the class of persons who can sell these drugs operate significantly to interrupt the flow of commerce as a matter of law. Much the same kind of argument, based upon Pennsylvania's rigid control of the distribution of alcoholic beverages, was rejected in *United States v. Erie County Malt Beverages Ass'n*, 1957 Trade Cases, par. 68,580 at p. 72,376 (W.D. Pa.) *affirmed*, 264 F.2d 731 (3d Cir. 1959).

The concept of "interstate commerce" when confronted with an exercise of state power, as in *Eli Lilly & Co. v. Sav-on-Drugs*, 366 U.S. 276 (1961), relied on by appellants, is quite different from the concept which is relevant in cases such as the instant one. *See Stafford v. Wallace*, 258 U.S. 495, 525 (1922).

Appellants assign as error the exclusion of some evidence of the procedure of the pharmacist in preparing prescriptions and of his relationship to the physician, on the grounds that it would have tended to show a stoppage of the flow of commerce. Without expressing an opinion on its admissibility on this issue, we note that its exclusion was at most harmless error since in substance this same evidence was put in by the Government's witness Geiger, and the appellants' witnesses Yee and Falor.

Appellants also allege as error an expression of the opinion of the trial judge as to the existence of interstate

commerce in the case.[14] Of course it is in the province of a federal trial judge to comment fairly on the evidence, so long as he leaves to the jury "the final decision and the power to disregard his remarks." *Duke* v. *United States*, 255 F.2d 721 (9th Cir.), *cert. denied*, 357 U.S. 920 (1958).[15] This is especially true where, as here, the issue is very nearly a mixed question of fact and law. *Heinecke* v. *United States*, 294 F.2d 727, 728-729, n. 4 (D.C. Cir.), *cert. denied*, 368 U.S. 901 (1961).

Appellants' last objection in this area is aimed at that part of the instructions which would require the jury to make a finding of interstate commerce before conviction could be possible. They single out the instruction on agreement, which in effect stated that, "[i]f you find in this case . . . an agreement . . . for the purpose of . . . fixing . . . prices . . . you are justified in finding the defendants guilty." Appellants' contention before the trial court was that this instruction seemed to dispense altogether with the requirement of a finding of interstate commerce. Although he had in fact previously given an instruction on that point, the trial judge as a safeguard recalled the jury and stated in

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[14] "In the opinion of the Court, and this is the only matter on which I express any opinion in this case, in the opinion of the Court the evidence is fully sufficient to show that the drugs were in the flow of interstate commerce when sold to the public and therefore that the Government has proved interstate commerce in this case. This, however, members of the jury, is only an opinion of the Court and you are not bound by it, and you are free to come to a different conclusion as you see fit."

[15] *Accord: United States* v. *Kravitz*, 281 F.2d 501 (3d Cir. 1960). Compare, *Quercia* v. *United States*, 289 U.S. 466, 469 (1933): "I think that every single word that man said, except when he agreed with the Government's testimony, was a lie;" and *United States* v. *Murdock*, 290 U.S. 389, 393 (1933): " . . . The court feels . . . that the Government has . . . proved that this defendant is guilty . . . beyond a reasonable doubt."

part, "[i]f you should find that there was not interstate commerce present in this case, then . . . your verdict would be an acquittal for the defendants." Appellants now contend that the instructions as originally given were faulty, that the attempted "cure" was unclear, and that in any event it was ineffective because it did not expressly withdraw the previous instruction. The instructions must be read as a whole, *Barrot* v. *United States*, 169 F.2d 929 (9th Cir.), *cert. denied*, 336 U.S. 912 (1949),[16] and so read might well be said to have been sufficient as originally given. Compare *United States* v. *DeMarie*, 226 F.2d 783 (7th Cir.), *cert. denied*, 350 U.S. 966 (1956). Contrary to appellants' claim, the earlier and later instructions were not "contradictory" or "inconsistent," so as to require a withdrawal of one,[17] and the "cure" was not at all unclear. Compare *Seaboard Air Line R. Co.* v. *Bailey*, 190 F.2d 812, 815 (5th Cir. 1951).

V. Evidence of an Agreement to Fix Prices.

The substance of the offense charged in this case, as set out earlier, is "a continuing agreement, understanding and concert of action among the defendants, co-conspirators, and others . . . to establish and maintain uniform prices for prescription drugs" by various enumerated means and devices. The co-conspirators are the Association as an active and independent legal entity, its officers, directors and committeemen insofar as they have carried on proscribed conduct, and those members of the Association who have

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[16] *Accord: Wolcher* v. *United States*, 218 F.2d 505 (9th Cir.) *cert. denied*, 350 U.S. 822 (1955). *Benatar* v. *United States*, 209 F.2d 734 (9th Cir.), *cert. denied*, 347 U.S. 974 (1954).

[17] Compare, *Mills* v. *United States*, 164 U.S. 644, 649 (1897), *Patterson* v. *United States*, 183 F.2d 687, 690 (5th Cir.), *cert. denied*, 343 U.S. 951 (1952), and *Nicola* v. *United States*, 72 F.2d 780, 787 (3d Cir. 1934).

knowingly, intentionally and actively participated in an individual capacity in the scheme which is said to result in the unlawful conspiracy.[18] Thus, to the limited extent that it carries on unlawful activity, the Association is itself a sort of continuing agreement by which the fixing of prices might be effectuated. This does not mean, however, that every member of the Association, by reason of his membership alone, becomes a co-conspirator. *Knauer* v. *United States*, 237 Fed. 8, 19-20 (8th Cir. 1916).[19] Knowledge and participation are required. Nor will proof of parallel business behavior alone conclusively establish agreement. *Theater Enterprises* v. *Paramount*, 346 U.S. 537 (1954). But as against the two appellants the evidence shows much more. Because of the size of the record, we summarize and select therefrom.

Appellant Hedgpeth, some time prior to the present litigation, had devised pricing formulae for use in his own pharmacy. At the expiration of his term of office as President of appellant Association, he remained for a time as a member of the executive board. During this time he offered to prepare a prescription pricing schedule which offer was accepted by the board. A committee of six pharmacy owners, with Hedgpeth as its chairman, undertook a pricing study. The committee deliberated on the inclusion in the proposed schedule of such items as the cost of materials, overhead, and markup. The committee ultimately agreed upon a schedule which Hedgpeth submitted to the executive board for approval. It was duly approved and the board agreed to print and distribute copies of the schedule to

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[18] Specific criminal intent is of course not required in this misdemeanor prosecution. See *Interstate Circuit* v. *United States*, 306 U.S. 208 (1939).

[19] Nor is every shareholder liable for corporate violations of the Sherman Act. *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 403 (1945).

members. At the January, 1957, Annual Association Meeting copies were distributed to the members present, and for those who could not attend, a special mailing of the schedule was arranged and carried out. The schedule contained the following explanation:

"This Prescription Pricing Schedule is the result of much thought and study plus many hours of work.

It is designed to make the pricing of prescriptions quick and easy, accurate and uniform.

It is based on a realistic knowledge of labor and other costs and uses the general formula—cost plus a reasonable markup plus a professional fee. It is hoped that all pharmacy will be helped through the use of uniform pricing methods.

Don Hedgpeth.

Issued 1/28/57."

Subsequent to this initial distribution, the schedule was from time to time revised, mostly upward. During this period, Hedgpeth went about the state "explaining" the use of the schedule. In March or April, 1959, the Prescription Pricing Committee sent out 1100 questionnaires printed at Association expense to members of the Association asking whether or not they used the Hedgpeth Schedule. Of 372 replies received, 257 used the schedule. The questionnaire also asked whether the user was in favor of increasing prices, leaving them as they were, or in favor of a reduction. Sixty-seven percent of the users in San Francisco and eighty-six percent of the users outside San Francisco favored no change in prices. Nevertheless, after studying this survey, Hedgpeth and his committee recommended *increasing* the prices. The recommendations of the committee were adopted by the executive board and a revised pricing schedule was printed and distributed on June 1, 1959.

The scale and character of the campaign undertaken by the Association in behalf of the widespread use of the schedule is revealed by the following excerpts from the record.

From the "President's Message of D. K. Hedgpeth;

"We can also change our thinking on another area of pricing. And as you might have already guessed, I am referring to that most important area in the whole drug store. The Prescription Department.

"In my humble opinion there is only one department over which (from a pricing standpoint) we have more or less complete control. Your Prescription Department not only yields the largest dollars and cents volume but it accounts for the lion's share of the Net Profit. A small increase in the price of each prescription filled will be reflected in a much greater Net Profit at the end of each year. I sincerely urge you all to reappraise your prescription pricing policy and bring it up to date. And remember the year is 1956 and not 1946. The heart of the drug store is the Prescription Department. It should be also the financial Backbone. Let's make it just that."

From the Minutes of the board meeting, October 22, 1958:

"Mr. Hedgpeth gave a very constructive reasoning in the presentation of his prescription pricing schedule. It is money in the pocket of every pharmacist when he uses the Hedgpeth schedule."

From a speech by Association official James J. McGoldrick, January 25, 1958:

"The pricing schedule was vigorously promoted during the year and a new, intelligent approach to prescription pricing will be available for you at this meeting. This schedule, in its promotion, I feel, has been one of the greatest benefits to members of our association, and its intelligent

application will add to better relations with the general public—for nothing causes more ill will, or acts as a detriment to pharmacy, than ridiculously underpriced or overpriced prescriptions. Many of our members have found through the use of this schedule a more sound and intelligent operation of their pharmacies. The hit and miss pricing of prescriptions is unethical and bad business practice."

From the Minutes of the 1958 Annual Meeting:

"Following a report by Mr. Hedgpeth on prescription pricing, a discussion was held on the need for continued activity in urging use of the pricing schedule. It was suggested that wherever feasible, local meetings be organized to discuss the matter, at which Mr. Hedgpeth agreed to take part whenever his time and availability would permit."

From a letter of Charles R. O'Malley, Association Secretary, to a local pharmacist, March 12, 1959:

Thank you for your note on the prescription pricing. The Hedgpeth schedule is being used by the majority of those pharmacists replying to the survey. Of 260 that replied, over 200 were out of San Francisco.

"We appreciate your frankness and at the same time are pleased to tell you that Don Hedgpeth has received many complimentary letters for the time and effort he has given to helping improve this situation."

From the Association bulletin, May 6, 1959:

"In announcing the new [1959] schedule, Don Hedgpeth emphasized the important reasons for its adoption: . . . (2) The industry-wide trend towards higher and more uniform prescription prices; . . ."

From the said O'Malley's grand jury testimony:

"Question: Well, having attended the meeting was it your impression that the people at the meeting, the officers and directors and the committee members, and so on, hav-

ing studied the pricing situation, were of the frame of mind that they should adopt the schedule and use it in pricing their prescriptions?

Answer: Yes."

From the testimony of Association official Marsh Pine before the grand jury (also incorporated in the present record, as was the above.):

Q. "... wasn't one of the purposes in circulating, distributing this Hedgpeth schedule to secure some degree of uniformity in prescription prices in Northern California?

A. That is a good statement.

Q. It is not only a good statement, it is a correct statement, isn't it? A. Right."

And finally, from Pine's new testimony at trial:

"Q. ... Was there any discussion as to why it should be known as the Hedgpeth schedule rather than the Northern California Pharmaceutical Association schedule?

A. Well, Mr. Banks, I think that all of us recognized, possibly, that it would be illegal if the Association put out a schedule."

These are but a few examples of the evidence to be found in over 1000 pages of trial transcript. We detail it to this extent to illustrate that in the phrase of the trial judge, the evidence was not merely "sufficient," but was indeed, "overwhelming" on this point. It thus seems evident that the jury had sufficient facts before it to find participation by the Association and Hedgpeth in an agreement to establish uniform prices by urging the adoption and promotion of the Hedgpeth Schedule. While it is not shown that every member individually used the schedule or participated in the agreement, such a showing is not required. *Plymouth Dealers Ass'n of No. Calif.* v. *United States*, 279 F.2d 128, 132-133 (9th Cir. 1960). And the inability of the Government to present a formal agreement is immaterial;

what is required and was here provided is substantial evidence from which such an agreement can be inferred: *Interstate Circuit* v. *United States*, 306 U.S. 208 (1939); *Bigelow* v. *RKO Radio Pictures*, 150 F.2d 877 (7th Cir. 1945), *rev'd on other grounds*, 327 U.S. 251 (1946). On the matter of agreement to fix prices, the instant case is closely analogous to *United States* v. *Nationwide Trailer Rental Systems*, 156 F. Supp. 800, 804-806 (D.Kans.), *aff'd mem.* 355 U.S. 10 (1957), and is on all fours with *United States* v. *Utah Pharmaceutical Association*, ... F. Supp. ... (D. Utah, 1962), a decision the reasoning of which, and its result we find highly instructive and persuasive on the several issues involved herein:

Certain rulings of the trial court relative to the "agreement" element of the case are complained of. Appellants assign as error the exclusion of a survey of prescription prices in Northern California during the period covered by the indictment. The trial court excluded the survey on the grounds first, that it was hearsay because none of the underlying documents or pharmacists' statements upon which the survey was based were offered by appellants, and second, because it was irrelevant insofar as it was offered to show lack of actual use of the Hedgpeth Schedule. The exclusion was correct. The reasons given therefor by the trial court are adequate.

The trial court refused to permit one of appellants' witnesses to define the word "uniform" as used in the schedule. That was a question for the jury. Compare, *Trenton Potteries* v. *United States*, 273 U.S. 392, 407 (1927). The trial court excluded other organizations' pricing schedules and advertisements therefor. They were irrelevant to the charge under consideration. The trial court admitted into evidence the minutes of certain county pharmaceutical associations. Appellants charge this as error. Said associations were properly linked to the appellant Association through evidence other than said minutes sufficient to sup-

port a finding of their participation in the main conspiracy. Said evidence other than the minutes included relevant correspondence between these local associations and the Secretary of appellant Association. Compare *Anthony* v. *United States*, 256 F.2d 50, 55 (9th Cir. 1958), and *Newman* v. *United States*, 156 F.2d 8, 10 (9th Cir.), *cert. denied*, 329 U.S. 760 (1946). This case is if anything the *opposite* of *Kotteakos* v. *United States*, 328 U.S. 750 (1946), relied on by appellants. The Association and Hedgpeth here stand in a like position to the conspirator *Brown* in *Kotteakos*, against whom the evidence of all the subsidiary conspiracies was obviously admissible, since he was the pivotal figure in all of them.

We have endeavored to cover all of appellants' numerous assignments and conclude that they are not sufficiently meritorious to warrant a reversal of this case.

Affirmed.

(Endorsed) Opinion Filed June 27, 1962.

Frank H. Schmid, Clerk.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17549

NORTHERN CALIFORNIA PHARMACEUTICAL ASSOCIATION, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL from the United States District Court for the Northern District of California, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered June 27, 1962.

Section 1 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, As Amended, 15 U.S.C. Section 1, at page 2359.

§ 1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * * Every person who shall make any contract or engage in any combination or conspiracy declared * * * to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. As amended July 7, 1955, c. 281, 69 Stat. 282.